



## STATE OF WISCONSIN Division of Hearings and Appeals

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In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent  
████████████████████  
████████████████████

DECISION

Case #: FOF - 163535

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Pursuant to petition filed January 29, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) for one year, a hearing was held on Tuesday, March 17, 2015 at 1:00 PM at Milwaukee, Wisconsin.

NOTE: On the hearing date, Mr. ██████████ indicated that he was not waiving his right to a hearing, but that he did not wish to participate in the hearing. So, Mr. ██████████ politely exited the phone conversation and hung up. The hearing proceeded in his absence.

The issue for determination is whether the Respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Nadine Stankey for the Office of Inspector General  
Department of Health Services - OIG  
PO Box 309  
Madison, WI 53701

Respondent:

██████████  
████████████████████  
████████████████████

**ADMINISTRATIVE LAW JUDGE:**

Mayumi Ishii  
Division of Hearings and Appeals

## **FINDINGS OF FACT**

1. The Respondent (CARES # [REDACTED]) is a resident of Milwaukee County who last received FoodShare benefits in September 2013. (Exhibit 4)
2. On June 19, 2014, a person<sup>1</sup> with Respondent's name posted "tweets" stating, "Which one of y'all cousins selling food stamps?"; "I need some like yesterday", and "Just bought a new deep freezer". (Exhibit 3)
3. On February 6, 2015, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that the Respondent attempted to traffic FoodShare benefits on June 19, 2014. (Exhibit 10)

## **DISCUSSION**

### *What is an Intentional Program Violation (IPV)?*

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;  
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

*FoodShare Wisconsin Handbook*, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

### *What is the Burden of Proof?*

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

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<sup>1</sup> The person tweeted about his birthday celebration on August 11, 2014, but the Respondent's birthday is August 12, 2014. As such, the evidence identifying the tweeter as the Respondent is a bit tenuous.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that it is true.

#### *The Merits of the Case*

This case deals with an allegation of trafficking. Under 7 CFR §271.2, trafficking means:

- (1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone;
- (2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;
- (3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount;
- (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or
- (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.
- (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration

other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

This definition became effective November 19, 2013.<sup>2</sup> The previous definition of trafficking did not include attempted trafficking.

More specifically, OIG alleges that the Respondent attempted to traffic FoodShare benefits, based upon postings on a Twitter account, also known as a tweets, stating, “Which one of y’all cousins selling food stamps?”; “I need some like yesterday,” and “Just bought a new deep freezer”. (Exhibit 3)

OIG provided no other evidence of attempted trafficking - no changes in EBT usage patterns, no continued dialogue regarding the sale of food stamps, no dialogue establishing a place to meet and method of sale, and no testimony from anyone who might have contacted the Respondent to sell him food stamps.

Even assuming *arguendo* that the post was created in June 2014 by the Respondent, there is insufficient evidence to show that the subject tweet meets the legal standards for proving an attempt.

The Federal Registrar addressing the amendment to the trafficking definition indicates that “attempt” consists of the “intent to do an act, an overt action beyond mere preparation, and the failure to complete the act.” Fed. Register Vol. 79, No. 162, pg. 51655<sup>3</sup> This is consistent with the standards for establishing attempt promulgated by the Wisconsin legislature, the Wisconsin courts and the Federal courts.

Wis. Stats. §939.32(3) states that, “An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.”

The Wisconsin Court of Appeals in State v. Henthorn, 281 Wis.2d 526, 518 N.W.2d 544 (Wis. App. 1998) restated the holding by the Wisconsin Supreme Court in Hamiel v. State, 92 Wis.2d 656, 666, 285 N.W.2d, that, “[I]t must ... be shown that: (1) the defendant's actions in furtherance of the crime clearly demonstrate, under the circumstances that he [or she] had the requisite intent to commit the crime ...; and (2) that having formed such intent the defendant had taken sufficient steps in furtherance of the crime so that it was improbable that he [or she] would have voluntarily terminated his [or her] participation in the commission of the crime.”

The Federal Courts have also dealt with establishing standards for determining when one has attempted to violate the law, as follows:

“As was true at common law, the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct...Not only does the word ‘attempt’ as used in common parlance connote action rather than mere intent, but more importantly, as used in the law for centuries, it encompasses both the overt act and intent elements.” U.S. v. Resendiz-Ponce, 549 U.S.102, 127 S.Ct. 782, 107 (2007)

The Seventh Circuit Court of Appeals<sup>4</sup> in U.S. v. Sanchez, 615 F.3d 836, 843 and 844 (7<sup>th</sup> Cir. 2010) followed this standard, stating that one must not only show an intent to violate the law, but also that the defendant took a substantial step toward completing the crime. The Court of Appeals further stated that, “a substantial step is

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<sup>2</sup> <https://www.federalregister.gov/articles/2013/08/21/2013-20245/supplemental-nutrition-assistance-program-trafficking-controls-and-fraud-investigations>

<sup>3</sup> See <https://www.federalregister.gov/articles/2013/08/21/2013-20245/supplemental-nutrition-assistance-program-trafficking-controls-and-fraud-investigations#h-13>

<sup>4</sup> Wisconsin is in the 7<sup>th</sup> Federal Judicial Circuit and as such, holdings from the 7<sup>th</sup> Circuit Court of Appeals are binding.



for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

## **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

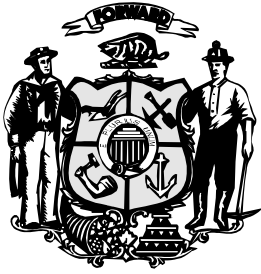
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 18th day of March, 2015.

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\sMayumi Ishii  
Administrative Law Judge  
Division of Hearings and Appeals

- c: Office of the Inspector General - email
- Public Assistance Collection Unit - email
- Division of Health Care Access and Accountability - email
- Nadine Stankey - email



## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on March 18, 2015.

Office of the Inspector General  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[NadineE.Stankey@wisconsin.gov](mailto:NadineE.Stankey@wisconsin.gov)